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## ALIEN ENEMIES AND JAPANESE-AMERICANS: A PROBLEM OF WARTIME CONTROLS

A PROBLEM of increasing importance in wartime America is the control of those groups in the population whose ties with the enemy make them potential enemy agents, but who have committed no overt act sufficient to justify detention. The problem is more immediate than in any previous foreign war because the continental United States is in danger of attack for the first time since 1812; and the techniques of modern warfare have emphasized the effectiveness of the fifth column and demonstrated the futility of counter-measures taken too late. At the same time, the scope of the problem is enlarged because widespread control must be exercised not only over aliens of enemy nationality but also over United States citizens—American-born Japanese who are not assimilated into American life and retain many cultural ties with Japan, and those German-born

American citizens whose sympathies remain with the fatherland.<sup>1</sup> Although individuals in other groups may be enemy sympathizers, every German or Italian alien and every member of the Japanese race is suspect as a potential enemy agent. However, the most that can be said against any one of them is that he is suspect. Undoubtedly, the overwhelming majority are loyal to our Government, especially in view of the ideological nature of the present struggle, and many will continue to reside here after the war. American tradition will not, therefore, permit a ruthless persecution of these groups. In adopting controls, military necessity must consequently be tempered with adherence to the spirit of constitutional and humanitarian prohibitions against deprivation of liberty without due process of law, and against exploitation and abuse of individuals because of race or nationality.

A government at war is subject to few restrictions in dealing with aliens of enemy nationality. International usage has long recognized the right of a belligerent sovereign to restrain, detain, or expel such aliens found in his territory at the outbreak of war.<sup>2</sup> This sovereign right stems from a concept of antiquity which regarded such an alien as an enemy, even though he entered the sovereign's territory during time of peace.<sup>3</sup> The modern rationale, however, is that the legal allegiance to the enemy owed by the alien of enemy nationality will, presumably, cause him to assist the enemy if he is not restrained.<sup>4</sup> Consequently, the sovereign may take against the alien of enemy nationality whatever steps he deems necessary to national security. His discretion is limited by only two considerations: peacetime international intercourse will be hampered if there is no stability of person and property during war; and the enemy may take reprisals.<sup>5</sup>

1. In the United States in 1940 there were 1,237,772 persons of German birth, of whom 314,105 were aliens, and 1,632,579 persons of Italian birth, of whom 690,551 were aliens. For statistical analysis of the German and Italian born population of the United States, see the Fourth Interim Report of Select Committee Investigating National Defense Migration (Tolan Committee) in H. R. REP. NO. 2124, 77th Congress, 2d Session, (1942) 227-245 (Hereinafter cited as H. R. REP. 2124). There were 120,947 Japanese racials in the United States in 1940, of whom 79,642 were of American birth and therefore citizens. *Id.* at 91. About nine-tenths of the Japanese are on the West Coast; see note 50 *infra*.

2. 2 HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED IN THE UNITED STATES (1922) 226; 2 OPPENHEIM, INTERNATIONAL LAW (McNair's 4th ed. 1926) 204-207.

3. 2 WESTLAKE, INTERNATIONAL LAW (1904) 33.

4. 2 HYDE, *op. cit. supra* note 2, at 226; Garner, *The Treatment of Enemy Aliens* (1918) 12 AM. J. INT. L. 27; Cohn, *Legal Aspects of Internment* (1941) 4 MOD. L. REV. 200, 206.

5. Some authorities believe that "International law bars in a general way any 'abuse of power'; and 'the obvious duty to respect the dictates of humanity' constitutes a definite restriction on the discretion vested in the domestic government." Koessler, *Enemy Alien Internment: with special reference to Great Britain and France* (1942) 57 POL. SCI. Q. 98, 126. Analogously the basic principle of military necessity is subject, in the United States Army's interpretation of the rules of civilized warfare, "to the principles of humanity and chivalry." BASIC FIELD MANUAL, RULES OF LAND WARFARE

A steady amelioration of the treatment of alien enemies culminated, during the nineteenth century, in the almost total absence of alien enemy restrictions.<sup>6</sup> Some interpreters of international law seem to have been led by this to believe that international law no longer countenanced unlimited measures against aliens of enemy nationality.<sup>7</sup> However, under the conditions of modern warfare the major belligerents in the wars of the twentieth century have reverted to strict control of enemy nationals and their property. And despite the injunctions of international law, internment of some aliens and some confiscation of enemy-owned property have been practiced during both the first and second world wars.<sup>8</sup>

The English and American courts, obedient to precedents running back to the beginnings of English law, have steadfastly maintained that the alien enemy has no rights other than those which the sovereign chooses to grant.<sup>9</sup> The control of alien enemies is held to be a political matter in which the executive and the legislature may exercise an unhampered discretion<sup>10</sup>—except for the dictates of international law, which have generally controlled at least the Congress if not the Executive. In the United States, by virtue of the Act of July 6, 1798,<sup>11</sup> full authority to control “all natives, citizens, denizens, or subjects” of the enemy within the United States rests in the hands of the President.<sup>12</sup> When war is declared or invasion attempted or threatened, he may proclaim “the manner and degree of the restraint to which they shall be subject, and in what cases, and upon what security their presence shall

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(Judge Advocate General's Dep't 1940, FM 27-10). See also Comment (1919) 28 YALE L. J. 478.

6. 2 HYDE, *op. cit. supra* note 2, at 228.

7. See 2 OPPENHEIM, *op. cit. supra* note 2, at 205; Hershey, *Treatment of Enemy Aliens* 12 AM. J. INT. L. 156, 157, 158 (1918); 2 WESTLAKE, *op. cit. supra* note 3, at 42; BORCHARD, DIPLOMATIC PROTECTION OF CITIZENS ABROAD (1922) 62, 109; Garner, *loc. cit. supra* note 4, at 28; Comment (1919) 28 YALE L. J. 478.

8. *Ibid.*

9. DeLacey v. United States, 249 Fed. 625-626 (C. C. A. 9th, 1918), citing 1 BL. COMM. \*372; Brown v. United States, 8 Cranch 110 (U. S. 1814); Lockington's Case, 1 Brightly 269 (Pa. Sup. Ct. 1813); Lockington v. Smith, 15 Fed. Cas. 758, No. 8,448 (C. C. D. Pa. 1817); Case of Fries, 9 Fed. Cas. 826, No. 5,126 (C. C. D. Pa. 1799). See MEARES, TRADING WITH THE ENEMY ACT (1924) 508-509, and cases there cited. See Porter v. Freudenberg [1915] 1 K. B. 857, 869.

10. Lockington v. Smith, 15 Fed. Cas. 758, No. 8,448 (C. C. D. Pa. 1817).

11. REV. STAT. § 4067 (1875), as amended April 16, 1918, 40 STAT. 531 (1918), 50 U. S. C. §§ 21-24 (1940). The amendment made the Act applicable to females, as well as males.

12. In Brown v. United States, 8 Cranch 110 (U. S. 1814), Chief Justice Marshall said in a dictum that the Act “affords a strong implication that he (the President) did not possess these powers by virtue of the declaration of war.” *Id.* at 126. The English view, however, is that restraint of alien enemies requires no statutory authority, being a power of the king by virtue of his office. See Cohn, *supra* note 4; Bentwich, *Britain's Wartime Alien Policy* (1942) 5 CONTEMP. JEWISH RECORD, 41, 44.

be permitted . . . and . . . establish any other regulations which shall be found necessary in the premises and for the public safety." In 1812,<sup>13</sup> in 1917,<sup>14</sup> and in 1941<sup>15</sup> the Act has been invoked and regulations promulgated thereunder.

Utilizing the authority contained in this Act, the Wilson administration developed a framework for control of alien enemies during the World War.<sup>16</sup> Following closely the 1917 procedure, President Roosevelt on December seventh and eighth issued three separate proclamations<sup>17</sup> enumerating the restraints to be placed on the conduct of all aliens of German, Japanese, and Italian nationality, and the Department of Justice commenced systematic apprehension and detention of alien enemies believed actively supporting the Axis.<sup>18</sup>

Although large blocks of the Roosevelt proclamation were identical with the Wilson proclamation of April 6, 1917,<sup>19</sup> there were certain noticeable omissions. The President did not repeat the Wilson passage which said:

"And so long as they shall conduct themselves in accordance with law, they shall be undisturbed in the peaceful pursuit of their lives and occupations, and be accorded the consideration due to all peaceful and law-abiding persons, except so far as restrictions may be necessary for their own protection and for the safety of the United States; and towards such alien enemies as conduct themselves in accordance with law, all citizens are enjoined to preserve the peace and to treat them with all such friendliness as may be compatible with loyalty and allegiance to the United States."

And where President Wilson said:

"And all alien enemies who fail to conduct themselves as so enjoined, in addition to other penalties prescribed by law, shall be liable to restraint, or to give security, or to remove and depart from the United States, in the manner prescribed by sections four thousand sixty-nine and four thousand seventy of the Revised Statutes,<sup>20</sup> and as prescribed by the regulations duly promulgated by the President."

13. Male British subjects over 18 years of age were forbidden to dwell within 40 miles of tidewater. United States marshals enforced this restriction. See *Lockington's Case*, 1 Brightly 269 (Pa. Sup. Ct. 1813); *Lockington v. Smith*, 15 Fed. Cas. 753, No. 8,448 (C. C. D. Pa. 1817).

14. See Wilson's Proclamations, 40 STAT. 1650, (Germany) (1917); 40 STAT. 1729, (Austro-Hungary) (1917); 40 STAT. 1716 (Additional regulations and registration required (1917). See, generally, Hunter, *Alien Rights in United States in War-time* (1918) 17 MICH. L. REV. 33.

15. See Roosevelt's Proclamations: No. 2525, 6 FED. REG. 6321 (1941); No. 2526, 6 FED. REG. 6323 (1941); No. 2527, 6 FED. REG. 6324 (1941).

16. See note 14 *supra*.

17. See note 15 *supra*.

18. N. Y. Times, Dec. 8, 1941, p. 6, col. 8.

19. 40 STAT. 1650, 1651 (1917).

20. REV. STAT. §§ 4069, 4070 (1875), 50 U. S. C. §§ 21, 22 (1940).

President Roosevelt merely said:

"All alien enemies shall be liable to restraint, or to give security,"  
etc.

The deletions may have been prompted by nothing more than a desire to eliminate verbiage; however, at least one federal district judge construed the omission as "the deliberate intent on the part of our Government at this time to impose greater restrictions upon subjects of enemy countries resident here than were imposed in 1917."<sup>21</sup> For this reason, he ordered stay of proceedings for the duration of the war in an action in tort brought by citizens of Germany, temporarily residing in Pennsylvania. This decision was handed down on January 14. But on January 31, Attorney General Biddle issued a statement<sup>22</sup> to clarify the right of resident aliens of enemy nationality to sue in federal and state courts. He pointed out that, while the President may, by proclamation under Sections 2(c) and 7(b)<sup>23</sup> of the Trading with the Enemy Act, bar resident aliens of enemy nationality from the courts, no such proclamation had yet been issued; and further that the Act of 1798, under which the proclamations of December 7 and 8 were issued, did not relate to the right of access to the courts. In consequence, he stated that "no native, citizen, or subject of any nation with which the United States is at war, and who is resident in the United States, is precluded by federal statute or regulations from suing in federal or state courts."

The Roosevelt proclamations forbade any alien of enemy nationality to have in his possession or use any article on a list which included firearms, implements of war, cameras, short wave radio sets, and maps or drawings of military equipment or positions; to travel from place to place without conforming to regulations issued by the Attorney General; to belong to or advocate the views of any organization banned by the Attorney General; to utilize air transport without permission; or to enter or leave the United States or territories thereof except according to regulations drawn up by the proper authorities. The Attorney General was charged with executing the regulations regarding the conduct of alien enemies in the continental United States, the Virgin Islands, Puerto Rico, and Alaska;<sup>24</sup> the Secretary of War was similarly charged with respect to the Hawaiian and Philippine Islands and the Canal Zone.

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21. Barksdale, D. J., in *Bernheimer v. Vurpillot*, 42 F. Supp. 830, 832 (E. D. Pa. 1942). On alien enemies as litigants, see generally, (1942) 30 CALIF. L. REV. 358; (1942) 19 INTERPRETER RELEASES 107 *et seq.* (published by the Common Council for American Unity. Hereinafter cited as INTERPRETER RELEASES).

22. C. C. H. War Law Service ¶9703 (1942).

23. 40 STAT. 411, 416 (1917), 50 U. S. C. App. §§ 1-31 (1940), amended by 55 STAT. 839 (1941).

24. Administration of the regulations in Alaska was transferred to the Secretary of War by Proclamation No. 2533, 7 FED. REG. 55 (1942).

Orders clarifying the proclamations were subsequently issued by the Attorney General.<sup>25</sup> Aliens of enemy nationality were defined as non-naturalized "citizens, natives, or subjects" of Germany, Japan, or Italy, over 14 years of age, or persons now stateless who before becoming stateless were nationals of Germany, Japan, or Italy.<sup>26</sup> The regulations do not apply to Austrians, Austro-Hungarians, or to Koreans, or to former German, Japanese or Italian nationals who have become naturalized citizens of neutral or friendly powers.

The Attorney General's orders also detail the conditions under which alien enemies may travel freely within their home communities in the ordinary pursuits of life, including travel to and from business, school, worship, or government agencies. Travel from one locality to another, or change of residence, is forbidden without a permit from the United States District Attorney, to be granted on application if after seven days the District Attorney "shall know of no reason why such travel would be a source of danger" to the United States. A semi-permanent permit may be obtained by theatrical performers, traveling salesmen, or other persons traveling on regular business.

In addition to the restraints contained in these proclamations, aliens of enemy nationality were required to register and procure identification cards in February, pursuant to a Presidential proclamation of January 14, 1942,<sup>27</sup> and the regulations of the Attorney General issued thereunder.<sup>28</sup> This registration, not to be confused with the general registration of all aliens required under the Alien Registration Act of 1940,<sup>29</sup> enabled the government to obtain comprehensive information as to the whereabouts of alien enemies.<sup>30</sup>

Coincidental with the promulgation of these regulations and restrictions applicable to aliens of enemy nationality, the Federal Bureau of Investigation has been summarily arresting any Axis nationals on whom falls par-

25. Orders of Attorney General, (1942) 10 U. S. L. WEEK 2405; (1942) 10 U. S. L. WEEK 2425. Revised Regulations were issued by the Attorney General, 7 FED. REG. 844 (1942), and printed in pamphlet form for use in the offices of United States attorneys. INTERPRETER RELEASES 60 *et seq.*

26. Great Britain defines an enemy subject as "an individual who, not being either a British subject or a British protected person, possesses the nationality of a state at war with his majesty the King." In France, the term alien enemy is defined as 'les ressortissants ennemis'. In the Reich, alien enemies are aliens belonging to an enemy state, including those persons without nationality who before the loss of their nationality were citizens of an enemy power. Kempner, *The Enemy Alien Problem in the Present War* (1940) 34 AMER. J. INT. L. 443. Compare Note (1942) 51 YALE L. J. 1388, 1393.

27. No. 2537, 7 FED. REG. 329 (1942), (1942) 10 U. S. L. WEEK 2441.

28. Order of Attorney General, (1942) 10 U. S. L. WEEK 2441.

29. 54 STAT. 673, 8 U. S. C. §§ 451 *et seq.* (1942).

30. The identification cards, issued in the general format of a passport, contain the photograph, fingerprints, and signature of the alien of enemy nationality, and blank pages to which may be attached travel permits.

ticular suspicion of enemy activity.<sup>31</sup> Such summary arrest, or even mass internment of all enemy nationals, is held by the courts to be within the discretionary powers of the President to determine the manner and degree of the restraints to be placed upon alien enemies.<sup>32</sup> The courts will not review the acts of the President or his agents,<sup>33</sup> or take any jurisdiction over the matter, beyond ascertaining that the person arrested is, in fact, a native, denizen, citizen, or subject of the enemy.<sup>34</sup> Judicial reasoning has been that summary powers have been conferred on the President by Congress through a legitimate exercise of the Congressional war power, inasmuch as the control of alien enemies is a matter solely within the domain of the political branch of the government.<sup>35</sup> Section 3 of the Act of July 6, 1798,<sup>36</sup> which authorizes the criminal courts to hold hearings and dispose of alien enemies brought before them on sworn complaint, has been construed as an additional sanction which may be invoked against alien enemies, and not as a limitation on the President's powers.<sup>37</sup>

However, after the courts had virtually read the provision for a hearing out of the Act, the administration took advantage of the free hand accorded the executive to provide for a hearing for arrested aliens. Early in January, the Attorney General announced that 92 alien hearing boards had been established in the 86 federal judicial districts in which the Department of Justice exercises jurisdiction over the apprehension of dangerous alien enemies.<sup>38</sup> These boards, composed of three to six civilian members serving without pay, hear whatever case the accused may have to present. However, the boards' recommendations are not binding on the Attorney General, and the hearing has only such importance as the Department chooses to attach to it. The "hearing has been provided, not as a matter of right, but in order to permit them to present facts in their behalf," according to the Department's instructions to the hearing boards.<sup>39</sup>

Nevertheless, the establishment of the hearing boards would seem to weigh against any inference of harsher treatment for aliens of enemy nationality that might be drawn from a consideration of the portions of the Wilson

31. 8,010 alien enemies had been arrested by April 15. N. Y. Times, April 16, 1942, p. 7, col. 3.

32. *Lockington v. Smith*, 15 Fed. Cas. 758, No. 8,448 (C. C. D. Pa. 1817).

33. *Ex parte Fronklin*, 253 Fed. 984 (N. D. Miss. 1918); *Ex parte Graber*, 247 Fed. 882 (N. D. Ala. 1918).

34. *Ex parte Gilroy*, 257 Fed. 110 (S. D. N. Y. 1919); *Ex parte Risse*, 257 Fed. 102, 104 (S. D. N. Y. 1919); *Banning v. Penrose*, 255 Fed. 159 (D. C. Ga. 1919).

35. *De Lacey v. United States*, 249 Fed. 625, L. R. A. 1918E 1011, 1018 (C. C. A. 9th, 1918) and cases cited.

36. See note 11 *supra*.

37. *Ex parte Graber*, 247 Fed. 882 (N. D. Ala. 1918); *Lockington v. Smith*, 15 Fed. Cas. 758, 761, No. 8,448 (1817).

38. (1942) 10 U. S. L. WEEK 2456. Control over enemy aliens is divided between the War Department and the Attorney General's Department. See p. 1320 *supra*.

39. Department of Justice, Supplemental Instructions to Alien Enemy Hearing Boards, January 8, 1942. Quoted in INTERPRETER RELEASES 15b.

proclamation omitted by President Roosevelt. Even though the Department of Justice has been careful that the establishment of enemy hearing boards shall erect no lasting limitation on the powers of the executive, the boards represent at least a gesture toward more humane and more individual treatment of aliens of enemy nationality. About half of the 2,548 aliens appearing before the hearing boards prior to May 3 were paroled or released.<sup>40</sup>

In addition to these controls applicable to aliens of enemy nationality, the Department of Justice has attempted to reach former Axis nationals, now naturalized, who are believed dangerously subversive. Officers and members of the German-American Bund have been subject to special scrutiny.<sup>41</sup> Denaturalization and indictments on charges of evading defense laws have been the principal weapons against this group of potential enemy agents.<sup>42</sup>

Denaturalization is an especially potent weapon against citizens of Axis birth, since such persons after denaturalization may be treated as aliens of enemy nationality, subject to summary arrest and detention. The availability of such denaturalization procedure, possible under Section 738 of the Nationality Code of 1940,<sup>43</sup> is limited by the necessity of showing fraud at the time of naturalization. A mental reservation at the time of pledging allegiance, sufficient to establish fraud, has by some courts been inferred from subsequent disloyal activity.<sup>44</sup> Attorney General Biddle has sought additional legislative authority to revoke naturalization for conduct indicating primary allegiance to a foreign country,<sup>45</sup> and has mentioned membership in the German-American Bund as conduct which would weigh heavily in determining disloyalty.<sup>46</sup>

40. Complete figures announced on May third are as follows:

	<i>Released.</i>	<i>Paroled.</i>	<i>Interned.</i>	<i>Total.</i>
Germans .....	228	491	556	1,275
Italians .....	73	91	113	277
Japanese .....	70	243	633	996
	371	875	1,302	2,548
	(14.5%)	(34.3%)	(51.1%)	

INTERPRETER RELEASES 198. Interned aliens are charged of the War Department and are placed in internment camps. *Id.* at 194 *et seq.* In addition to this class of aliens to be interned in camps there are also 2,400 additional aliens of enemy nationality being held in three camps operated by the Department of Justice. These latter are aliens who were ordered deported and against whom there were warrants of deportation outstanding. But because of the war abroad and the lack of transportation facilities it was not possible to deport them. *Id.* at 199.

41. N. Y. Times, March 26, 1942, p. 25, col. 2.

42. N. Y. Times, July 8, 1942, p. 1, col. 3.

43. 54 STAT. 1158, 8 U. S. C. § 738 (1940).

44. See *United States v. Wursterbarth*, 249 Fed. 908 (D. N. J. 1918); *United States v. De Tolna*, 27 F. (2d) 984 (E. D. N. Y. 1928); *United States v. Herberger*, 272 Fed. 278 (W. D. Wash. 1921); but *cf.* *United States v. Tedesco*, 31 F. Supp. 322 (S. D. N. Y. 1940). Note (1942) 52 YALE L. J. 1215, 1222.

45. H. R. 6250, § 8. Passed House January 13, 1942. (1942) 10 U. S. L. WEEK 2456. The measure was rejected by a Senate committee.

46. (1942) 10 U. S. L. WEEK 2456; N. Y. Times, March 26, 1942, p. 25, col. 2.



Indictments have also been obtained against Bund members and officers on charges of conspiracy to evade the Selective Service Act, conspiracy to counsel Bund members to resist service in the armed forces of the United States, and conspiracy to conceal Bund affiliations in filling out alien registration forms.<sup>47</sup> If, as has been charged,<sup>48</sup> the Bund, nominally defunct since the start of the war, has been continuing to operate as an underground organization, other provisions of the espionage and sabotage laws may be available to attack the remnants of the organization.<sup>49</sup>

#### JAPANESE EVACUATION ON THE WEST COAST

The existing framework of controls, applicable to aliens of enemy nationality, served adequately to safeguard the greater part of the United States against potential enemy agents. However, the states on the West Coast presented a different and special problem. From a military standpoint, the West Coast was the most active area in the nation and the most vulnerable to sabotage and espionage. Japanese racials in America were largely concentrated on the Coast,<sup>50</sup> and this group was generally considered the most dangerous potential source of enemy agents of any racial or national group in the country.

The first measures taken to protect the Coast attempted to use the existing "alien enemy" controls. In January, the Attorney General proclaimed 117 zones, chiefly on the waterfront and near militarily strategic points, from which all aliens of enemy nationality were excluded.<sup>51</sup> Because many of these restricted zones were in urban areas, evacuation of 10,000 aliens was required, a problem which necessitated the assistance of the Federal Security Agency in order to help the aliens move and find new homes and jobs.<sup>52</sup> At the same time, a stringent curfew applying to all aliens of enemy nationality in the West Coast area required them to be in their homes from 9 p.m. to 6 a.m., and within five miles of their homes at other times, unless in transit to or from work or in possession of a special permit.

The measures were generally considered inadequate.<sup>53</sup> From a military standpoint, it was felt that the barred zones were too small. There was also

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47. N. Y. Times, July 8, 1942, p. 1, col. 3.

48. *Ibid.*

49. These statutes are collected in 50 U. S. C. §§ 31-45d (1940).

50. Of the 126,947 Japanese residents of the continental United States in 1940, 112,353, or 88.5 percent, lived in Washington, Oregon, and California, H. R. REP. NO. 2124, p. 92.

51. INTERPRETER RELEASES 86. The Department of Justice releases are in H. R. REP. 2124, pp. 302-314.

52. See testimony of Richard H. Neustadt, Regional Director Social Security Board, San Francisco, before Tolan Committee, February 21, 1942, at San Francisco. *Hearings before Select Committee Investigating National Defense Migration on Problems of Evacuation of Enemy Aliens and Others from Prohibited Military Zones Pursuant to H. R. Res. 113, 77th Cong., 2d Sess. (1942) 11024* (hereinafter cited as *Hearings*).

53. A summary of the objections to the Attorney General's orders, and the arguments for and against evacuation, is contained in H. R. REP. 2124, Section E, "Attitudes on Removal", pp. 139-156.

the feeling held by some that great danger was to be anticipated from the Japanese, two-thirds of whom were citizens and consequently untouched by the alien restrictions. And it was contended that the *nisci*<sup>54</sup> and *kibei*,<sup>55</sup> of American birth and citizenship, were more dangerous than the older *issai*,<sup>56</sup> because they felt more keenly the discriminations against the Japanese on the Coast. Feeling against the Japanese in some quarters reached such a point that some authorities feared mob violence unless the public was quieted by a program of reassuring controls. After the West Coast Congressional delegation had petitioned the President for treatment based on "loyalty", not "citizenship",<sup>57</sup> and some sections of popular opinion had branded the Attorney General's actions as insufficient because based on "legalistic and unworkable" distinctions between aliens and citizens,<sup>58</sup> the President on February 25, 1942 issued Executive Order No. 9066.<sup>59</sup> This authorized the Secretary of War and military commanders designated by him to prescribe military areas from which "any or all persons" might be excluded, and within which any or all persons might be subjected to restrictions.<sup>60</sup> Under the authority thus obtained, Lieutenant General De Witt, Commander of the Western Defense Area, issued a public proclamation on March 2 and announced he would proceed with the gradual evacuation of all Japanese from an area roughly 100 miles wide along the Coast.<sup>61</sup> General De Witt made it clear that he deemed the Japanese racials the most dangerous group, with the exception of the active Axis agents who were being rounded up by the F.B.I., that he would insist

54. American-born Japanese, resident since birth in the United States.

55. American-born Japanese, who received a part of their education in Japan.

56. Japanese-born Japanese.

57. H. R. REP. No. 1911, 77th Cong., 2d Sess. (1942) 3 (Preliminary Report and Recommendations on Problems of Evacuation of Citizens and Aliens from Military Areas, March 19, 1942). The letter here reproduced was written to the President on February 13, 1942, and signed by seven congressmen representing the West Coast delegation.

58. Walter Lippmann, syndicated column, N. Y. Herald-Tribune, Mar. 21, 1942, p. 13, col. 1.

59. 7 FED. REG. 1407 (1942). Although the order refers to "national defense material, national defense premises, and national defense utilities," as defined in 54 STAT. 1220, 50 U. S. C. § 104 (1940), the President seemed to depend on the power vested in him as President and Commander-in-Chief, rather than on any statutory authority. On the powers of the President as commander-in-chief, see generally, 3 WILLOUGHBY, CONSTITUTIONAL LAW OF THE UNITED STATES (2d ed. 1929) §§ 1031-1032; BERRAHL, WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES (1920) 43 ff., 101 ff.; POMEROY, INTRODUCTION TO CONSTITUTIONAL LAW OF THE UNITED STATES (19th ed. 1886) §§ 303 ff.

60. Acting under authority conferred upon him by this order, General Drum, commander of the East Coast area, has promulgated certain dimout and blackout regulations along the seaboard. He has stated that regulation and control of conduct and movements of enemy aliens and any other persons suspected of subversive activities will be undertaken. But while there may be evacuation by selective processes, mass evacuation is not contemplated. N. Y. Times, April 27, 1942, p. 1, col. 4.

61. N. Y. Times, Mar. 4, 1942, p. 1, col. 3. General De Witt's Proclamations are collected in H. R. REP. 2124, pp. 317 ff.

on the evacuation of all Japanese from the Coast, and that he might go so far as to require the evacuation of all Axis aliens.<sup>62</sup> He also prescribed regulations in addition to those of the Attorney General to govern aliens of enemy nationality, establishing in particular a more stringent curfew.<sup>63</sup>

The entire evacuation has been handled as a federal military problem. The Wartime Civil Control Administration was established in General De Witt's command,<sup>64</sup> and plans prepared for evacuation of the Japanese, in small groups, area by area. Prior to March 30,<sup>65</sup> when army-conducted evacuation began, Japanese were permitted to leave the area voluntarily; some did so, but of these a few, reporting that the hostility of communities into which they had attempted to move made voluntary evacuation unfeasible,<sup>66</sup> returned to depart again under Army guidance.

The WCCA, however, proposed merely to supervise the removal of the evacuees, and not to provide further care for them. The War Relocation Authority, established in the Office of Emergency Management by the President by Executive Order No. 9102, March 18, 1942,<sup>67</sup> was created to arrange for internment camps for the evacuees, to provide them with work, and otherwise to care for them during the period of the war. Since the mass evacuation was the result of the Government's inability to fulfill its obligation of discriminating between innocent and guilty, it was only equitable that the cost should be borne by the Government. And full authority to provide medical care, transportation, food, shelter, and clothing for the evacuees, with the privilege to enlist the aid of other federal agencies, was given the WCCA and the WRA by the executive orders under which they were created. Congress inferentially approved the entire evacuation procedure when, on March 21, 1942 it passed Public Law No. 503,<sup>68</sup> which makes violation of any restrictive orders promulgated for a military area by the Secretary of War or a military commander a misdemeanor punishable by fine and imprisonment.

Utilizing the fiction that the property of "evacuee nationals" was property belonging to "nationals of a foreign country" the Treasury Department in-

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62. N. Y. Times, Mar. 4, 1942, p. 1, col. 3. The army has now abandoned its plans to evacuate German and Italian aliens; and several thousand German and Italian aliens who were required to move out of prohibited or restricted areas set up in California by Attorney General Biddle in late January or early February will be able to move back into or to work in these districts under a proclamation issued by Lieut. Gen. John L. De Witt. N. Y. Times, June 29, 1942, p. 4, col. 1.

63. Public Proclamation No. 3, March 24, 1942, 7 FED. REG. 2543 (1942), H. R. REP. 2124, p. 330.

64. H. R. REP. 1911, 77th Cong., 2d Sess. (1942) 10. See N. Y. Times, April 15, 1942, p. 33, col. 1.

65. Movement from the military area by Japanese after midnight, March 29, was forbidden unless under military supervision by Public Proclamation No. 4, March 27, 1942, 7 FED. REG. 2601 (1942), H. R. REP. 2124, p. 331.

66. N. Y. Times, April 9, 1942, p. 7, col. 5.

67. 7 FED. REG. 2165 (1942); N. Y. Times, March 19, 1942, p. 14, col. 2.

68. Pub. L. No. 503, 77th Cong., 2d Sess. (March 21, 1942).

voked the Trading with the Enemy Act to give itself power over evacuees' property.<sup>69</sup> In a partial delegation of this power, the Treasury Department authorized the Federal Reserve Bank of San Francisco to serve as custodians for the property of evacuees, and to block transactions involving evacuee-owned property.<sup>70</sup> The Farm Security Administration, by another delegation of authority from the Treasury Department, was empowered to administer farms left vacant by the compulsory evacuation of their owners or lessors.<sup>71</sup>

Executive Order No. 9066 and the evacuation procedure adopted pursuant thereto present an interesting problem of constitutional law. The evacuation was undertaken by General De Witt under the authority vested in him by the Executive Order. However, before the actual evacuation was begun Congress inferentially approved the Presidential Order by passing a law making it a misdemeanor to violate any regulation issued by a military commander under the Executive Order.<sup>72</sup> Thus authority for the evacuation derives from both the Congressional and Presidential war powers in the Constitution.<sup>73</sup> Among the constitutional sanctions which might be taken to limit governmental action of this kind are the Fourth Amendment relating to unreasonable searches and seizures and the due process clause of the Fifth Amendment.<sup>74</sup>

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69. "The term 'evacuee national' shall mean any Japanese, German, or Italian alien, or any person of Japanese ancestry, resident on or since Dec. 7, 1941, in Military Area No. 1 or in specified zones in other military areas prescribed in or pursuant to public proclamations issued by Lt. Gen. J. L. De Witt, Commanding General of the Western Defense Command and the Fourth Army. For the purpose of this regulation all evacuee nationals are nationals of a foreign country." Special Regulation No. 1, 7 FED. REG. 2184 (1942). The regulation provides that the bank may declare the property of evacuee nationals "Special Blocked Property", and forbid transactions, just as the Alien Property Custodian under Section 5b of the Trading with the Enemy Act may freeze the property of any foreign national.

70. Special Regulation No. 1, under Executive Order 8389, April 10, 1940, as amended, and Sec. 5b of the Trading with the Enemy Act, as amended by the First War Powers Act, 1941, issued by William A. Day, President of the Federal Reserve Bank of San Francisco. Confirmed by E. H. Foley, Jr., Acting Secretary of the Treasury. March 21, 1942. 7 FED. REG. 2184 (1942).

71. The Secretary of the Treasury delegated authority to the Secretary of Agriculture on April 6, 1942. 7 FED. REG. 2713 (1942). By successive delegations within the Department of Agriculture, the authority reached Laurence I. Hewes, west coast regional director of the Farm Security Administration. 7 FED. REG. 2713 (1942), 7 FED. REG. 2747 (1942). See N. Y. Times, April 17, 1942, p. 32, col. 1.

72. Pub. L. No. 503, 77th Cong., 2d Sess. (March 21, 1942).

73. Congressional powers include the power to declare war (U. S. CONST. Art. I, § 8, cl. 11), to raise and support armies (U. S. CONST. Art. I, § 8, cl. 12), to provide and maintain a navy (U. S. CONST. Art. I, § 8, cl. 13), and to make rules for the government and regulation of the land and naval forces (U. S. CONST. Art. I, § 8, cl. 14). Presidential powers derive from his designation as commander in chief of the army and navy of the United States (U. S. CONST. Art. II, § 2, cl. 1).

74. U. S. CONST. AMENDS IV, V. Congress could by passing an act suspending the writ of habeas corpus render the detention of the Japanese immune from action on

Judicial attempts to reconcile these two sets of constitutional provisions in the circumstances of the Japanese evacuation may well await the end of the war. The courts may very possibly refuse to disturb actions deemed necessary by the political branch, just as during the Civil War the Supreme Court refused certiorari to review the adjudications of a military commission,<sup>75</sup> although after the war the court declared that such commissions could not constitutionally be created.<sup>76</sup> However, if the evacuation orders come squarely before the Court, there are a number of judicial rationales on which they can be upheld against the various constitutional sanctions which might be invoked.

Military necessity for the evacuation offers the most obvious approach. Executive Order No. 9066 makes no mention of the Japanese, but merely authorizes the restriction of "any or all persons" as the military commander deems necessary; however, the Proclamations of General De Witt, issued under the Order, have stressed the "military necessity"<sup>77</sup> of removing Japanese aliens and citizens from the area for the protection of the nation and the Japanese themselves. Can that "military necessity" justify, on the ground that their forbears happened to be born in enemy territory, exclusion of 71,000 American citizens from their homes and jobs and their confinement, without hearing, for the war's duration, in designated centers under military guard? In view of the hazards of lightening war the courts might hold that the exigency on the West Coast justified the evacuation order. The question, however, raises some of the issues which separated the majority and minority in *Ex parte Milligan*.<sup>78</sup>

The majority laid down the dictum in that case that "martial law cannot arise from a threatened invasion". The invasion must be real, "such as effectively closes the courts and deposes the civil administration".<sup>79</sup> Very probably the action of the military command on the West Coast in evacuating the Japanese might not weather this judicial test.<sup>80</sup> However, the dictum

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the part of the judiciary for the duration of the emergency. U. S. CONST. ART. I, § 9, cl. 2.

75. *Ex parte Vallandigham*, 1 Wall. 243 (U. S. 1863).

76. *Ex parte Milligan*, 4 Wall. 2 (U. S. 1866).

77. General De Witt's proclamations and orders are collected in H. R. REP. 2124, pp. 317-348. The proclamations are in 7 FED. REG. 2405, 2543, 2601, 2713 (1942). There has been no declaration of martial law on the West Coast to date.

78. 4 Wall. 2 (U. S. 1866).

79. *Id.* at 127. This test was reduced to a farce in *Burke v. Miltenberger*, 19 Wall. 519, 524 (U. S. 1873), where the court accepted the existence of military rule as conclusive proof that civil authority had not been restored.

80. In *Ex parte Ventura*, 44 F. Supp. 520 (W. D. Wash. 1942), petitioner, an American-born Japanese, the wife of a citizen of the Philippine Commonwealth, was denied habeas corpus to prevent application to her of the exclusion orders and other restrictions. Judge Black expressed the opinion that habeas corpus was not the proper remedy, as she had not yet actually been taken into custody. He went on to say, however, that if habeas corpus was the proper remedy he would uphold the evacuation orders on grounds of military necessity. He distinguished the present military situation of the

could be avoided by the courts by differentiating between the "martial law" mentioned in the *Milligan* dictum, when invasion or insurrection necessitates complete military control superseding civil authority, and the situation on the West Coast where military authorities prescribe regulations to maintain civil authority in vital areas.<sup>81</sup> In addition, this dictum has been criticized as laying down too inflexible a test for conditions of modern warfare, and it is quite possible that the courts today would disregard it in favor of one allowing the military a freer hand.<sup>82</sup>

In connection with the military necessity argument, the courts might stress the peculiar situation of the Japanese as a distinctive racial group unassimilated into American culture and preserving many cultural and economic ties with Japan.<sup>83</sup> It could further be argued that the loyalty of the Japanese as a group is open to suspicion because of their unassimilated position, and that public opinion on the Coast necessitates steps to protect the Japanese against mobs and violence. Arguing along this line, it is possible to conclude that the strict letter of the Constitutional guaranties may be lifted for the duration of the emergency.

As an alternative to the "military necessity" approach, the courts might hold that Constitutional guaranties do not extend to the Japanese because of the dual citizenship of the American-born Japanese or because their progenitors were not eligible for naturalization. The dual citizenship argument is based upon the Japanese law<sup>84</sup> which recognizes as citizens of Japan its racials born in the United States after December 1, 1924, who were registered at the Japanese consulate within 14 days of birth and who did not, after reaching their twentieth birthday, renounce Japanese citizenship at the Consulate; or, further, any racials who were born before the effective date and did not renounce citizenship after their twentieth birthday.<sup>85</sup> It is

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state of Washington from that of Indiana at the time the *Milligan* case arose. The American Civil Liberties Union announced on June 1st that it planned to test the validity of the evacuation orders in the case of Gordon Hirabayashi, an American-born Japanese student at the University of Washington who refused to leave. (1942) 10 INT. JURID. ASS'N MO. BULL. 125, 136, n. 62.

81. See *Commonwealth ex rel. Wadsworth v. Shortall*, 206 Pa. 165, 170-171, 55 Atl. 952, 953 (1903). But cf. *United States ex rel. Palmer v. Adams*, 26 F. (2d) 141 (D. C. Colo. 1928). See also Arnold, *Martial Law* in (1933) ENCYC. SOC. SCIENCES 162.

82. See FAIRMAN, *THE LAW OF MARTIAL RULE* (1930) 144, n. 5; Fairman, *The Law of Martial Rule and the National Emergency* (1942) 55 HARV. L. REV. 1253, 1286. See also WIENER, *A PRACTICAL MANUAL OF MARTIAL LAW* (1940) 106. The petition of the eight Nazi saboteurs to the Supreme Court for a writ of habeas corpus discharging them from the jurisdiction of a military tribunal offers an opportunity for modification of the *Milligan* dicta. See N. Y. Times, July 30, 1942, p. 1, col. 8, and N. Y. Times, Aug. 1, 1942, p. 1, col. 1.

83. See H. R. REP. NO. 1911, 77th Cong., 2d Sess. (1942); H. R. REP. 2124, pp. 59-138.

84. Imperial Ordinance No. 262, issued Nov. 15, 1924. See NATIONALITY LAWS (Flournoy and Hudson's ed. 1929) 384. See also INTERPRETER RELEASES, 87-88.

85. The number of American-born Japanese possessing dual citizenship is not known, as the consulate general at San Francisco keeps no statistics on such matters. Statement

possible to step from this to the conclusion that, during war with Japan, we can deny American-born Japanese the rights of American citizens on the grounds that they may owe allegiance to Japan.

A parallel line of argument is that American-born Japanese are not citizens of the United States by birth, inasmuch as their parents could not obtain United States citizenship and consequently were mere visitors to our shores, incapable of passing citizenship by birth.<sup>86</sup> Acceptance of this argument would involve the overruling of *United States v. Wong Kim Ark*,<sup>87</sup> and the espousal of the dissent of Mr. Chief Justice Fuller.<sup>88</sup> Aside from the judicial tangles inherent in reversal of such well-established precedent, such a decision would seem politically unwise in view of our present alliance with China and India.<sup>89</sup>

Such judicial holding would, of course, establish a dangerous precedent for the future. Whatever the alleged exigencies of today may be, the Japanese are being discriminated against on a racial basis. If, in the passion of today, the courts accept this procedure, a similar case against the Jew or the Negro could be made the basis of an executive order issued in the passion of tomorrow.

Consequently, if the courts see fit to uphold the evacuation of the Japanese, it is to be hoped they will surround it with adequate safeguards, and recognize the controls adopted only because of the extreme military danger of the West Coast, its vulnerability to espionage and sabotage, the concentration of an unassimilated culture group in the area, the necessity of protecting the Japanese against mob violence, and the inferential Congressional sanction.<sup>90</sup> Judicial approval which stressed these sanctions for the action might

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of California Joint Immigration Committee in *Hearings*, p. 11083, referring to letter of December 19, 1935, from Shuh Tomii, consul general of Japan at San Francisco.

86. See speeches by Senator Stewart (D., Tenn.), 88 CONG. REC., March 20, 1942, at 2863-2865 and Representative Rankin (D., Miss.) 88 CONG. REC., Mar. 10, 1942, at A1013. Representative Rankin has introduced a bill, H. R. 6699, 77th Cong., 2d Sess. (1942), "To provide for taking into custody certain persons who are citizens or subjects of, or owe allegiance to, any nation or country with which the United States is at war," so worded that in effect it deprives American-born Japanese of the rights of citizenship during war with Japan. Senator Stewart introduced a similar bill into the Senate. S. 2293, 77th Cong., 2d Sess. (1942).

87. 169 U. S. 649 (1898).

88. 169 U. S. 649, 705 (1898).

89. Suit was recently brought in a federal district court by a number of California organizations, among them the Native Sons of the Golden West, to strike from a ballot list the names of American citizens of Japanese origin. The argument was based largely on a frank request for an overruling of *United States v. Wong Kim Ark*. On the authority of that case the district judge dismissed the suit. See N. Y. Times, July 3, 1942, p. 7, col. 5.

90. Such safeguards present an analogy to the "clear and present danger" test used in determining the acceptability of restrictions on free speech. See Comment (1942) 51 YALE L. J. 798, 801. However, it is probable that national security requires a wider range for the discretion of authorities in determining when military necessity requires restraint

succeed in fencing in the present discrimination sufficiently to minimize the danger of the precedent.

The procedure whereby the Federal Reserve Bank of San Francisco was authorized to act as custodian of evacuee property would seem especially vulnerable to attack in the courts. It early became apparent that strong measures were necessary to protect the property of the evacuees, many of whom were liquidating their assets at forced sale and under conditions that smacked of fraud.<sup>91</sup> The Bank has thus far offered its services only where an evacuee sought its assistance.<sup>92</sup> The order, however, enables the Bank to go further and block transactions in property where it believes such action is necessary. The announced purpose is to protect absent evacuees from exploitation by conniving creditors. Legal authority for such blocking rests, however, on the definition of evacuee-owned property as property owned by "foreign nationals",<sup>93</sup> subject to federal sequestration and control under the Trading with the Enemy Act. This makes an American citizen a foreign national for certain purposes. Judicial approval of this transparent fiction might have dangerous consequences. If the Treasury Department can define a property-owning enemy as any person it desires to include within the term, whatever sanctity remains to property during wartime can be destroyed. And while some arrangement for preserving evacuee property is essential, it is to be hoped that the present "protective custody" setup will be administered with a view toward the evacuees' best interests. During the last war when the office of the Alien Property Custodian was established in 1917, the avowed purpose was to "conserve and protect"

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of civilians than is necessary in free speech cases. Consequently, a "grave potential" rather than a "clear and present" danger would seem to be the criterion for military restrictions.

91. Numerous instances were reported of very low offers made for valuable Japanese property and suggestions made to Japanese that they had better sell in a hurry since the Government was planning to evacuate them immediately. See H. R. REP. 2124, p. 173 and references to *Hearings* there cited. Section 1689 of the California Code (Deering, 1941) provides that a party to a contract may rescind it where his consent was obtained by "undue influence"; and § 1575 defines "undue influence" in part as "taking a grossly oppressive and unfair advantage of another's necessities or distress." It is possible that the courts might under these sections set aside some of the most inequitable of these contracts made when the Japanese were obviously at a great disadvantage. See *Frank Boyson v. Fred W. Gross*, 83 Cal. App. 638, 257 Pac. 137 (1927); *Virginia Weger v. Joseph Rocha*, 138 Cal. App. 109, 32 P. (2d) 417 (1934); and *Jennie E. Weakley v. George L. Melton*, 189 Cal. 44, 207 Pac. 523 (1922).

92. The program and activities of the Bank are outlined in H. R. REP. 2124, pp. 348-351. Recommendations are summarized pp. 13-16. See note 70 *supra*, and N. Y. Times, March 12, 1942, p. 14, col. 6. The Bank has declined to assume any risk for security of the property against either fire or theft and has refused to assume any responsibility for securing a purchaser for the property. Interned as they are, the Japanese are obviously unable themselves to protect their property or to enforce effectively conditions in leases and contracts of sale.

93. See note 69 *supra*.



enemy-owned property.<sup>94</sup> However, even before the end of that war, the Custodian, under the excuse of "Americanizing" enemy-owned property, was in effect confiscating it as one step in economic warfare against the Kaiser's Germany.<sup>95</sup> Should the courts extend judicial acceptance to the tenuous fiction under which evacuee property is presently being conserved, it is conceivable that a similar "enlargement" of the activities of the Bank might take place.

Because the courts will probably uphold the evacuation orders and because, if the army and the executive take the same attitude as during the Civil War, judicial disapproval will become ineffective,<sup>96</sup> the constitutional and legal aspects of evacuation would seem to be of mainly academic interest at present. Of much more immediate concern is the administrative problem of removing the evacuated nationals from the restricted areas and caring for them elsewhere for the duration of the war.

The removal and resettlement of 105,000 persons presents a titanic administrative undertaking. It has been divided into two parts: the evacuation, carried on by the WCCA; and the resettlement, carried on by the WRA. Although complete reports are still lacking, the main evacuation seems to have been fairly well handled, after some bungling in the first few small-scale programs.<sup>97</sup>

It is impossible at the present time to evaluate the work of the WRA. In the tremendous program involved in resettlement of 100,000 Japanese, the sites have already been chosen for seventeen areas in which the evacuees will be relocated for the duration of the war.<sup>98</sup> These sites have all been selected on land owned or leased by the Federal government in order that improvements, made at public expense, may later remain public property. By June first only three of the permanent relocation camps had been occupied;<sup>99</sup> the great bulk of the evacuees were still living in temporary assembly

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94. GATHINGS, *INTERNATIONAL LAW AND AMERICAN TREATMENT OF ALIEN ENEMY PROPERTY*, Introduction, v (1940).

95. See Borchard, *Reprisals on Private Property* (1936) 30 AM. J. INT. L. 108.

96. The best-known example is, perhaps, the ignoring of the writ of habeas corpus issued by Chief Justice Taney in *Ex parte Merryman*, 17 Fed. Cas. 144, No. 9,487 (C. C. D. Md. 1861), and the inability of the United States Marshal to serve the writ of attachment for contempt subsequently issued by Taney. See RANDALL, *CONSTITUTIONAL PROBLEMS UNDER LINCOLN* (1926) 120-121, 161-162.

97. Fisher, *Japanese Evacuation from the Pacific Coast* (June 29, 1942) 19 FAR EAST. SURVEY, 145, 147.

98. Two of the sites are in California at Manzanar and Tule Lake; two are in Arizona—Parker Dam and the Gila area; one in Idaho at Minidaka; one in Wyoming near Cody; one in Colorado near Lamar; one in Utah; and two in Arkansas. In these areas will be located nine camps housing ten thousand evacuees and eight housing five thousand. More than one camp will be located in some of the areas which will be military areas under the protection of military police. INTERPRETER RELEASES, p. 238. See generally H. R. REP. 2124, pp. 197-226.

99. In the Manzanar, Tule Lake and Parker Dam areas. INTERPRETER RELEASES 241.

camps administered by the WCCA.<sup>100</sup> Although the WRA exercises final control over the relocation camps, its policy to date has been to allow the evacuees to set up their own internal government and handle as many of their own affairs as possible.

The WRA in making provision for work by the evacuees has set up the War Relocation Work Corps. Enlistment in the Corps is voluntary, and the worker gets a salary besides housing, food, clothing, and educational, medical and hospital services. Salary rates are twelve, sixteen and nineteen dollars a month for unskilled, skilled and professional workers respectively.<sup>101</sup> The chief activity will be agriculture although public works and manufacturing requiring skilled hand labor are also being planned. Provision has also been made for furlough to private industry when certain conditions are fulfilled.<sup>102</sup> Hospitals and schools will be set up and staffed as far as possible with skilled members from among the evacuees.

It appears from this that the present resettlement program is being administered as a temporary measure to care for the evacuees during the war. It does not appear that the administration is going forward with the idea of working a complete resettlement and readaptation of the evacuees to American life. If the administration of the WRA continues along these lines, it would seem that its work will be nothing more than a stop-gap wartime blunder, perpetuating the conditions that have given rise to the present problem. The evacuation of the Japanese is necessary primarily because, unlike many racial groups, they have not been assimilated into the American culture,<sup>103</sup> but have remained a distinctive group. Because they are an outstanding example of the failure of the melting pot, they are now suspect as potential enemy agents, and must be controlled as such.

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100. Of the hundred thousand Japanese evacuated prior to June 1st, eighty thousand were still in assembly centers, and only twenty thousand were located in the permanent resettlement camps. *Id.* at 238.

101. *Id.* at 240.

102. If the community to which the Japanese are to go assures that law and order will be preserved, if transportation is provided without cost to the United States, if prevailing wages are paid, suitable accommodations provided, and no other labor replaced, and if payment is made to the United States to defray the expenses of the dependents at the relocation center while the Japanese is privately employed. *Id.* at 240, 241.

103. Charges have been made that the evacuation was motivated more by racial prejudice than "military necessity". In a sense, however, the military problem derives from the popular opinion in the area. A military commander charged with defending an area against invasion might well feel that even such a drastic step as mass evacuation was preferable to complicating his military problem by retaining in the area a racial group against whom a popular feeling, already high, might be fanned by invasion into overt acts of violence. See INTERPRETER RELEASES 210.

Mass restraints on Japanese in Hawaii have not yet been imposed, despite the apparently greater danger, chiefly because such a policy of "internment" would mean a much greater interruption of Hawaii's economic life than was the case in the Pacific Coast states. See Horlings, *Hawaii's 150,000 Japanese* (1942) 155 NATION 69. However, Hawaii has been placed under martial law.

The non-assimilation of the Japanese seems to be, in part at least, due to a program of discrimination that has been carried on for a number of years on the West Coast.<sup>104</sup> Because of this discrimination, many Japanese have felt it necessary to maintain some ties with Japan, and all have been forced to remain a group apart. However, these Japanese are expected to remain in this country after the war. To prevent a repetition of the present situation, they should be assimilated into American life, in part through a program of education, and should preferably be scattered in small groups throughout the country to facilitate this end.<sup>105</sup> The problem has been pithily stated by the Tolan Committee: Americanization or Deportation.<sup>106</sup> The present program of the WRA does not seem to be calculated to accomplish the former. And certainly if a permanent barrier is not to be set up between the evacuated Japanese and the American community, at the end of the war it will not be possible simply to release the evacuees and allow them to shift for themselves. Their assimilation into American life must be facilitated through properly designed Governmental measures.

Subsidiary problems seem to have been better handled. Efforts are being made to place in inland colleges the Japanese college students dislodged from West Coast colleges by the exclusion orders.<sup>107</sup> The Bank, in spite of its dubious legal authority, seems to have been attempting to give some help to the evacuee property owners, although there is complaint that the property of the Japanese has been liquidated at too fast a rate.<sup>108</sup> And the WRA has commendably rejected the demand from certain fruit and

104. For a brief sketch of the Japanese in America, see H. R. REP. 2124, pp. 59-90. (History of Japanese Settlement in the United States). See McWilliams, *California and the Japanese* (1942) 106 NEW REPUBLIC 295.

In 1913 California passed the ALIEN PROPERTY ACT (Calif. Stats. 1913, p. 206), prohibiting ownership of land for agricultural purposes by those persons ineligible for citizenship and limiting leasing privileges for the same group to three years. In 1920 the ALIEN PROPERTY INITIATIVE ACT (Calif. Stats. 1921, p. lxxxiii) was passed which abrogated completely the right of persons ineligible to citizenship to lease land. The constitutionality of such acts was upheld in *Terrace v. Thompson*, 263 U. S. 197 (1923). For laws prohibiting alien ownership of land and regulating interests in land held by aliens see CALIF. GEN. LAWS (Deering, 1937) Acts 253, 261; WASH. REV. STAT. ANN. (Remington, 1932) § 10581 *et seq.*; ORE. COMP. LAWS ANN. (1940) § 61 *et seq.* See Comments (1934) 22 CALIF. L. REV. 420 and (1931) 19 CALIF. L. REV. 602, 623; Malcolm, *The Japanese Problem in California* (Spring 1942) 13 WORLD AFFAIRS INTERPRETER 28.

105. Reports indicate that some California groups and individuals are taking advantage of the present opportunity to attempt to make permanent the removal of Japanese from the life of the state. Thus attempts are being made to plug loopholes in the alien land laws and to exclude Japanese from certain trades and professions. See McWilliams, *Japanese Evacuation Policy and Perspectives* (Summer 1942) COMMON GROUND 65, 68; Wills, *The West Coast Japanese* (Aug., 1942) 42 ASIA 487, 490. See also the attempt to obtain an overruling of the *Wong Kim Ark* decision in order to deprive American born Japanese of their citizenship, note 89 *supra*.

106. H. R. REP. No. 1911, 77th Cong., 2d Sess. (1942) 15.

107. N. Y. Times, April 12, 1942, p. 39, col. 2.

108. H. R. REP. No. 2124, p. 14.

vegetable growers who apparently desired to obtain gangs of Japanese to work on their farms at forced labor and low wages, although the reason given for the refusal was that the army was unable to spare enough men to guard small gangs of Japanese laborers.<sup>109</sup>

Collateral problems raised by the evacuation have necessitated the attention of other federal agencies. The forced evacuation created a difficult problem with regard to agricultural lands formerly operated by Japanese.<sup>110</sup> In many instances, crops were already in the ground and required immediate attention. Under the delegation of power from the Treasury Department through the Secretary of Agriculture, the Farm Security Administration was empowered to take over and supervise the operation of all farms owned by persons evacuated from restricted areas.<sup>111</sup> Pursuant to this authority, an attempt has been made to find tenants for all land and to save all crops in the ground at the time of evacuation.<sup>112</sup>

The wisdom with which the evacuation is administered is of great importance. If the Japanese are properly cared for in the camps and an honest attempt made to reintegrate them into American ways of life, and if their property is conserved and not dissipated in liquidation proceedings and custodianship, it is possible that the evacuation may not create a group trauma that will separate irrevocably 105,000 of our population from any possibility of Americanization. There are indications that the present administration may fail in this field. On the assumption that the courts will uphold the evacuation orders, or that, if they do not, the executive and the military will enforce the orders in the absence of judicial approval, the wise choice of administrative methods assumes extra importance. The only safeguards against abuse of the evacuation procedure to exploit and persecute the evacuees lies in the hands of the administrators. Realistic, rather than constitutional, safeguards must operate here.

### CONCLUSION

The control of the groups in our population who are potential enemy agents is in a state of flux. The controls developed in 1917-1918 have been applied, with minor variations, to the aliens of enemy nationality. But, in recognition that controls based on technical enmity are inadequate under present conditions, new controls seem to be in the making.

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109. N. Y. Times, April 15, 1942, p. 7, col. 1. However, it was later decided to permit members of the War Relocation Work corps, set up by the WRA, to go on "furlough" from the camps to work on farms outside resettlement projects, at "prevailing wages". Employers must guarantee they are not importing Japanese to compete with local labor. N. Y. Times, May 15, 1942, p. 7, col. 4.

110. See H. R. REP. No. 2124, pp. 117-138. (Participation of Japanese in Agricultural Production).

111. See note 71 *supra*.

112. Ninety per cent of the 233,566 acres of farm land operated by Japanese had been leased or sold to new operators by May 12. N. Y. Times, May 13, 1942, p. 4, col. 6.

The exclusion orders directed at the West Coast Japanese represent one branch of the change. The restrictions are here placed, not on a group recognized in the courts as enemy, and consequently without rights that the sovereign is bound to respect, but upon a particular group of our own citizens, tainted as hostile as a result of current events. Thus the concept of alien enemy appears to be expanding to include citizens who readily fall into a class of potential enemy sympathizers. However, legal justification for the change must be predicated on military necessity, demonstrable in a court of law, and not on the inherent lack of rights of the persons restrained.

Another aspect of the change is exemplified by the establishment of enemy hearing boards for the examination of aliens of enemy nationality who are suspected of hostile activity. Even though the hearing is not a matter of right, it would appear to represent a more humane attitude toward the unfortunate alien caught in enemy territory. In addition, there is a vigorous demand in some quarters for the expansion of the enemy hearing boards, and the classification of aliens of enemy nationality as "dangerous", "suspicious", or "innocuous",<sup>113</sup> with an appropriate degree of restraint placed on persons in each category. Like the Japanese evacuation, this seems to be a move toward treatment based on loyalty, rather than citizenship, but a more refined technique than the Japanese evacuation in that it applies individual rather than group criteria of loyalty as determinant of the degree of restraint to be imposed.

The same trend is observable in England, where at the start of the present war all aliens of enemy nationality were classified by local hearing boards.<sup>114</sup> The most dangerous were interned; those deemed suspect were given freedom with heavy restrictions; those deemed relatively innocuous were permitted almost complete freedom. During the national hysteria that followed Dunkerque, the work of the enemy hearing boards was overthrown and virtually all German nationals in England interned. Since then, however, most of the internees have been released on an individual basis.<sup>115</sup> Meanwhile, under Section 18B of the Defense (General) Regulations,<sup>116</sup> wide latitude has been given the Home Secretary to order the imprisonment of any person believed

113. H. R. REP. 2124, pp. 27, 30. And see letters to the N. Y. Times: J. G. McDonald, April 6, p. 14, col. 6; R. M. W. Kempner, April 10, 1942, p. 16, col. 6; W. C. Dennis, April 13, p. 14, col. 6; P. J. Eder, April 15, p. 20, col. 6. There is sentiment in favor of setting up individual hearing boards for the interned Japanese and releasing those approved by the boards. See for example, American Civil Liberties Union-News, March, 1942, p. 1 (telegram from Mr. Roger Baldwin).

114. See, generally, Kempner, *The Enemy Alien Problem in the Present War* (1940) 34 AMER. J. INT. L. 443; Cohn, *supra* note 4; Bentwich, *supra* note 12; Koessler, *supra* note 5; LAFITTE, *THE INTERNMENT OF ALIENS* (1940).

115. Bentwich, *supra* note 12, at 42.

116. Regulation No. 18B(1) of Defense Regulations (General), S. R. & O. 1939, No. 927, p. 815, as amended by S. R. & O. 1939, No. 978, and No. 1681; and S. R. & O. 1940 No. 681, p. 24, No. 770, p. 30, and No. 942, p. 58. See Cohn, *supra* note 4, at 201; (1941) 57 SCOT. L. REV. 269.

dangerous to the public safety. The courts have held that the statement of the Home Secretary that he had reasonable cause to believe the person concerned should be imprisoned, as evidenced by his signature to the imprisonment order, is sufficient answer to a petition for habeas corpus.<sup>117</sup> A similar trend might be observed in Germany, which even before the war placed in concentration camps all those persons, irrespective of citizenship or alienage, who were deemed inimical to the Hitler regime.<sup>118</sup>

In the light of these trends, it would seem that the rigid demarcation between aliens and citizens is breaking down, and that in the internal wartime administration of the future the hostile citizen will be less protected by his constitutional rights, and the friendly alien of enemy nationality will be less subject to harassment because of his lack of such rights.

Such a revision of traditional attitudes would seem to reflect more nearly the conditions of the present war. In England, and less so in America, a large proportion of the German nationals, while technically enemy, were actually hostile to the German government and hopeful of an Allied victory. The ideological and racial nature of the present war appears, in many respects, to have cut across national lines and destroyed the value of old distinctions based on nationality.<sup>119</sup>

It is doubtful, of course, if this revision of the concept "enemy" will ever receive full recognition in the courts. The precedent that an alien enemy is determinable by his nationality, and once so designated can be restrained by the sovereign, is too well-established to be subject to judicial alteration at this late date. There is even ground for argument that it is a precedent which should not be overthrown, since it gives the political branch of the government a free hand to deal with what is essentially a political matter: the control of potential and actual enemy agents in wartime.

Consequently, it seems probable that the new standards on which the restraints of individuals will be based will be largely political and administrative. Not the courts, but the discretion of the executive and whatever force may exist in public opinion will set bounds to the restrictions placed upon persons during wartime.

Insofar as this change in standards serves to obtain a more equitable treatment of aliens on the basis of the honestly-determined loyalty of the individual rather than his assumed hostility, it would seem to be in line with the

117. *Liversidge v. Anderson and another* [1941] 3 All Eng. R. 338 (H. L. 1941). See also *Liversidge v. Anderson and Morrison*, [1941] 2 All Eng. R. 612 (C. A. 1941); *Stuart v. Anderson and Morrison* [1941] 2 All Eng. R. 665 (K. B. 1941); *Rex v. Home Secretary, ex parte Greene* [1941] All Eng. R. 104 (C. A. 1941); *Rex v. Home Secretary, ex parte Budd* [1941] 2 All Eng. R. 749 (K. B. 1941).

118. See Kempner, *supra* note 114, at 458.

119. See McWilliams, *Japanese Out of California* (1942) 106 NEW REPUBLIC 457.

120. The numerous laws dealing with treason, sedition and espionage make individual rather than mass treatment of aliens and citizens perfectly feasible from that standpoint. See note 49 *supra*.